No. 87-1729

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICUS CURIAE

The American Bar Association (the "ABA") is a voluntary national organization of the legal profession. With a membership of more than 300,000 individuals from every state and territory, its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges, legislators, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. From its inception more than

100 years ago, the ABA has taken an active interest in promoting the availability and effectiveness of counsel in our adversarial system of criminal justice. Because the forfeiture of bona fide attorney's fees impairs the right to counsel and undermines the adversarial system of criminal justice, the ABA seeks to appear as amicus curiae in this case.[1]

The ABA recognizes that the Government has a legitimate interest in the forfeiture of assets obtained through criminal activity. The ABA specifically condemns fee payments used as a sham to hide the defendant's assets. The ABA opposes, however, government-initiated restraints upon the payment of fees for representation in criminal cases, or the forfeiture of such bona fide fees.

After Congress enacted the Comprehensive Forfeiture Act of 1984 (the "CFA"), the ABA examined the impact of the enhanced forfeiture laws when applied to fee payments and identified their adverse consequences for our adversarial justice system. Pre-trial restraints on the payment of bona fide fees prevent the accused from using his assets to retain counsel of choice even before the adjudication of guilt or innocence or any verdict of forfeiture concerning those assets. Further, the mere prospect of fee forfeiture may deter many lawyers from undertaking a criminal representation. In addition to the risk of not receiving payment, defense counsel face ethical rules which prohibit them from undertaking any representation in which payment is dependent upon the outcome of trial. These constraints may impair defendant's ability to obtain adequate representation by counsel.

Equally troubling, those who proceed with the representation will have a financial disincentive to prepare the case thoroughly. The sole statutory criterion available to counsel for relief from a forfeiture verdict is a show-

[1] Letters from the parties consenting to the filing of this amicus brief have been filed with the Clerk of the Court.

ing that counsel had no knowledge that the assets were forfeitable. *See* 18 U.S.C. § 1963 (*l*) (6); 21 U.S.C. § 853 (n) (6). Hence, defense counsel may render himself ineligible for relief by acquiring knowledge of the financial affairs of the defendant.

Finally, the Government's discretionary power to add allegations of forfeiture gives the Government an unfair tactical advantage—the power to force the withdrawal of retained counsel at a time of the Government's choosing.

For all of these reasons, the ABA regards the forfeiture of bona fide fees as violative of the defendant's Fifth and Sixth Amendment rights to counsel of choice, to the effective assistance of counsel, and to due process of law.

The ABA appears here in order to underscore the increasing need for a definitive resolution of the issues raised in the petition. Members of the bar are struggling daily with the difficult legal and ethical questions raised by the practice of fee forfeiture. While litigation over the constitutionality of fee forfeiture has proliferated, it has not provided clear guidance. The continuing uncertainty over the permissibility of fee forfeiture and the necessity that such issues be relitigated in every case stand as powerful deterrents to the acceptance of representations. Litigation over fees will inevitably continue, absorbing energies that would be better directed to the adjudication of guilt or innocence and to the discharge of the duties of an otherwise overburdened federal judiciary.

The ABA submits that the best interests of the criminal justice system lie in a prompt resolution of the issues raised by the petition.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED IN THE PETITION HAVE NATIONAL IMPORTANCE AND REQUIRE PROMPT REVIEW

The statutory and constitutional issues raised by the petition have national importance. Uncertainty over these unresolved issues affects the representation of criminal defendants in both reported and unreported cases.

The recent wave of en banc and split panel decisions testifies to the importance and controversial nature of the issues raised by attorney fee forfeiture. As of this date, in three of the four circuits to address this issue, the original panel opinion has been vacated in order to permit rehearing en banc.[2] Moreover, each appellate decision addressing the issues, except the panel opinion reversed below, has had a dissenting or concurring opinion.[3]

In these decisions, the federal courts have struggled to accommodate the Government's interest in enforcement of the forfeiture laws, the defendant's constitutional rights, and the public's need for a vigorous criminal defense bar. But the results have been inconclusive. The courts of appeals have used different analyses, offered different procedural resolutions, and used different legal standards, thus magnifying the uncertainty for the participants in the criminal justice system.

For example, the decision below takes the position that the convicted defendant has no property interest in the

[2] Pet. at 7; United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987), rehearing granted (January 29, 1988); United States v. Jones, 837 F.2d 1332 (5th Cir. 1988), rehearing granted (April 26, 1988).

[3] *See, e.g.*, United States v. Nichols, 841 F.2d 1485, 1509 (10th Cir. 1988) (Logan, J., dissenting); United States v. Monsanto, 836 F.2d 74, 85 (2d Cir. 1987) (Oakes, J., dissenting); Caplin & Drysdale, App. at 26a (4th Cir. 1988) (Phillips, J., dissenting); United States v. Jones, 837 F.2d 1332, 1336 (5th Cir. 1988) (Davis, J., concurring); United States v. Thier, 801 F.2d 1463, 1475 (5th Cir. 1986) (Rubin, J., concurring).

forfeited assets as of the date the crime is committed and that no relief was authorized for the payment of bona fide attorney's fees. The Second Circuit, however, has ruled that in order to protect the defendant's constitutional rights, a pre-trial mini-hearing is required at which the Government will have the burden of proving the likelihood of forfeiture. *United States v. Monsanto*, 836 F.2d 74, 83-84 (2d Cir. 1987), *rehearing en banc granted* (January 29, 1988). Conversely, the Fifth Circuit has indicated that relief with respect to attorney's fees would be available at a *post*-trial hearing. *United States v. Jones*, 837 F.2d 1332 (5th Cir. 1988), *rehearing en banc granted* (April 26, 1988); *United States v. Thier*, 801 F.2d at 1474.

Moreover, the legal standards proposed for exemption of attorney's fees are conflicting. The decision below firmly states: "[W]here an attorney chooses to accept payment in assets named in a forfeiture indictment or a huge cash sum, any later attempts to avoid knowledge would be insufficient to qualify the attorney as a bona fide purchaser." App. at 18a. Two Fifth Circuit panels, in contrast, have held that "the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services." *United States v. Jones*, 837 F.2d at 1334; *United States v. Thier*, 801 F.2d at 1474, *as modified*, 809 F.2d at 249. Along the same lines, the Second Circuit panel has required that the Government produce prior to trial "evidence independent of the indictment" sufficient to show the likelihood of conviction and forfeiture, or forever lose the right to forfeit attorney's fees. *United States v. Monsanto*, 836 F.2d at 83.[4]

[4] *See also* United States v. Thier, 801 F.2d 1463, 1470 (5th Cir. 1986), modified, 809 F.2d 249 (5th Cir. 1987); United States v. Long, 654 F.2d 911, 915-16 (3d Cir. 1981) (In pre-trial hearings on restraining orders, "the government cannot rely on indictments

This melange of decisions does not provide adequate guidance for those directly involved in the representation of criminal defendants. Attorneys in private practice must confront on a daily basis the ethical and professional dilemmas now attendant upon the acceptance of compensation in criminal cases. Thus, it is essential that this Court confront those issues promptly, and define the ground rules for the criminal justice system.

Moreover, the consequences of fee forfeiture are not limited to defendants or their private counsel. Public defenders are also concerned that our system of appointed representation cannot afford the burdens associated with systematic substitution of appointed counsel into complex criminal cases.[5] These added burdens will fall on truly indigent defendants, the original constituency of our system of appointed counsel, who will compete with non-indigent defendants for the resources of federally appointed defenders.

Finally, the potential impact of the forfeiture statutes is far-reaching. The use of the criminal forfeiture sanction within the criminal code has recently been expanded. Criminal forfeiture, including the prospect of fee forfeiture, is a permissible punishment not only for all felony drug offenses, but also for all violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. Criminal offenses as divergent as securities fraud and obscenity can form the basis for a government claim for criminal forfeiture. *See* 18 U.S.C.

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alone."). *Contra* United States v. Nichols, 841 F.2d 1485, 1505 (10th Cir. 1988) (restraining order against fee transfer can be based on indictment alone).

[5] *See* Concerning Forfeiture of Attorney's Fees: Hearings before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (May 13, 1986) (Statement of Federal Public Defender Edward Marek on behalf of Federal Public Defenders and Federal Community Defenders).

§ 1961(1).[6] Thus, it has been estimated that as many as 25% of the criminal cases brought in federal court now involve offenses subject to criminal forfeiture. *See United States v. Nichols*, 841 F.2d at 1488. In addition, Congress, in 1984 and again in 1986, amended the criminal forfeiture laws to increase significantly the breadth of the assets subject to forfeiture.[7]

The increased role that Congress has given criminal forfeiture in our criminal justice system means that the continuing uncertainty over fee forfeiture will affect growing numbers of cases. As a practical matter, until this Court speaks, defense counsel will be obliged to litigate the constitutionality of fee forfeiture in virtually every case where it is sought.

More important, wholly apart from the litigated cases, fee forfeiture is affecting the practice of law in many situations that never become public. It is often difficult to determine the source of a client's fee payments.[8] Thus, defense attorneys are presently reluctant to accept representation in a wide range of criminal cases where forfei-

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[6] In 1984, for example, Congress expanded the class of offenses for which criminal forfeiture is possible to include all drug offenses, violations of the Currency and Foreign Transactions Reporting Act, and obscenity offenses. *See* 18 U.S.C. § 1961(1). In 1986, Congress created broad new money-laundering offenses, codified at 18 U.S.C. §§ 1956, 1957, which Congress also included as RICO predicate offenses in 18 U.S.C. 1961(1).

[7] United States v. Nichols, 841 F.2d 1485, 1488 (10th Cir. 1988) (CFA "expanded the scope of property subject to forfeiture"); Caplin & Drysdale, App. at 2a (same). *See* Public L. No. 98-473, §§ 302, 2301, 98 Stat. 2044, 2192-93 (1984); Public L. No. 99-570, § 1365(b), 100 Stat. 3207-35 (1986).

[8] As this Court recently noted, "It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand." Wheat v. United States, 56 U.S.L.W. 4441, 4444 (U.S. May 23, 1988).

ture is a possibility. Indeed, by deterring counsel from accepting many important criminal cases, fee forfeiture may inhibit the education and development of defense attorneys qualified to undertake such representation.

The ABA is deeply troubled about the effect that fee forfeiture will have on the independence of the criminal defense bar and on our adversarial system of justice. As matters now stand, defense counsel not only face conflicting ethical and professional admonitions, they also must speculate on what the final judicial position regarding fee payments in a forfeiture case will be. The ground rules for our adversarial system of justice should not be in dispute. This Court should act now to clarify issues raised in the petition.

II. FEE FORFEITURE RAISES SERIOUS CONSTITUTIONAL ISSUES

A number of courts have concluded, after a review of the legislative history, that Congress did not intend the CFA to encompass bona fide attorney's fees and they have construed the statute accordingly.[9] The ABA supports this interpretation of the statute, especially in light of the serious constitutional difficulties which would be created by a broader interpretation. The forfeiture of fees paid for representation in a criminal case would raise three constitutional issues of profound significance to an adversarial system of criminal justice.

1. The forfeiture of attorney's fees infringes upon the defendant's Sixth Amendment right to utilize his resources to retain private counsel.[10] The en banc majority

[9] United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

[10] A defendant should receive a "fair opportunity to secure counsel of his own choice," Powell v. Alabama, 287 U.S. 45, 53 (1932), because "the right to select and be represented by one's preferred

did not dispute the existence of a qualified right to counsel of choice, but held that "it does not apply at all in the fee forfeiture context", App. at 11a. The right was not implicated, according to the majority, because under the relation back doctrine the Government's title to forfeitable assets vests, upon conviction, on the much earlier date the assets were illegally acquired or used.

Until the defendant has been convicted, however, the Government must offer some justification sufficiently compelling to override the defendant's right to utilize his presumptively legal assets in his own defense. The other federal courts which have considered this issue have all recognized that fee restraints and forfeitures affect a defendant's right to choose counsel, thus requiring a weighing of the Government's interests against the defendant's qualified right. *United States v. Monsanto*, 836 F.2d 74, 82 (2d Cir. 1987), *rehearing en banc granted* (January 29, 1988); *United States v. Thier*, 801 F.2d 1463, 1466-70 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987); *United States v. Nichols*, 841 F.2d 1489, 1501-05 (10th Cir. 1988). The ABA submits that, when the Government's legitimate punitive interest in forfeiture is properly weighed against the defendant's interest in choosing counsel, the defendant's constitutionally-rooted interests should prevail.

2. Fee forfeiture impairs the attorney-client relationship necessary for the effective assistance of counsel guaranteed by the Sixth Amendment. If attorney's fees are subject to forfeiture after trial, defense counsel's collection of earned fees is contingent on the outcome of the trial—a situation which raises serious ethical concerns.[11]

counsel is comprehended by the Sixth Amendment. . . ." Wheat v. United States, 56 U.S.L.W. 4441, 4443 (U.S. May 23, 1988). This right, however, is a qualified right which may be overcome in limited circumstances when the needs of the orderly administration of justice so require. *See id.*

[11] The ABA Model Rules of Professional Conduct declare: "A lawyer shall not enter into an arrangement for, charge, or collect

Further, defense counsel faces an intolerable conflict created by his pecuniary interest in the outcome of the litigation. If a verdict of forfeiture encompassing attorney's fees is rendered at trial, the statutory mechanism for relief lies in a post-trial hearing at which defense counsel bears the burden of proving his ignorance of the facts which support the forfeiture verdict. *See* 21 U.S.C. § 853(n)(6); 18 U.S.C. § 1963(*l*)(6). Thus, as the District Court below noted, "the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with the proceeds of illegal activity." App. at 9a.[12]

A statutory scheme that makes a litigable issue out of the state of defense counsel's knowledge of defendant's financial affairs also risks a profound intrusion on attorney-client communications. Trial and grand jury subpoenas may be issued to defense counsel to testify regarding the amount and method of fee payments so as to demonstrate the forfeitability of the payments.[13] These

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. . . a contingent fee for representing a defendant in a criminal case." Model Rules of Professional Conduct Rule 1.5(d)(2). *See also* the predecessor Model Code of Professional Responsibility DR 2-106(C). In addition, the Rules prohibit representation of a client in a matter affecting personal financial interests. Rule 1.7(b) of Model Rules of Professional Conduct; *see also* Model Code of Professional Responsibility DR 5-101(A).

[12] Defense counsel faces other conflicts of loyalty as well. For example, defense counsel will have a conflict in advising his client about a possible plea bargain that touches upon the forfeitability of the defendant's assets. *See* United States v. Bassett, 632 F. Supp. 1308, 1316 n.5 (D. Md. 1986), aff'd, 814 F.2d 905 (4th Cir. 1987), overruled, United States v. Caplin & Drysdale, 837 F.2d 637 (4th Cir.) (en banc); Reckmeyer, App. at 91a-92a; United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985).

[13] On February 10, 1986, the ABA House of Delegates adopted a resolution endorsing a requirement for prior judicial review of subpoenas directed at defense counsel by the prosecution. The supporting ABA Report documents the chilling effect of such subpoenas on the attorney-client relationship.

place defense counsel in the untenable position of being a witness against his own client.[14] Such inquiries before, during, and after trial, which necessarily focus on counsel's knowledge of the defendant's financial activities, will chill attorney-client communications.

3. Finally, fee forfeiture raises troubling due process issues insofar as it gives the Government an ability to control the resources of the defense. The timing of an application for a pre-trial restraining order, and the invocation of the relation back doctrine are left, in the first instance, to the unfettered discretion of the prosecution. *See* 21 U.S.C. §§ 853(c), (e); 18 U.S.C. §§ 1963(c), (d). As a practical matter, such a restraining order will likely cause counsel to withdraw, thus vesting the prosecution with the discretionary authority to disengage the services of chosen defense counsel at any stage in the criminal proceeding.

Such power is inconsistent with the Fifth Amendment. The Due Process Clause "does speak to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). Further, the independence of defense counsel is compromised by the prospect of continued representation only by the grace of the prosecution. *See United States v. Estevez*, 645 F. Supp. 869, 871-72 (E.D. Wis. 1986). "There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Polk County v. Dodson*, 454 U.S. 312, 322 (1981).

Fundamental fairness, which is guaranteed by the Fifth Amendment, *see Estelle v. Williams*, 425 U.S. 501, 505 (1976); *Powell v. Alabama*, 287 U.S. 45, 63 (1932),

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[14] The ABA Model Rules generally forbid representation in any case in which counsel may be called as a witness. *See* Model Rule 3.7; Model Code DR 5-102.

demands that the defendant not be handicapped in this way in the presentation of his defense. A system which affords one party to a controversy the discretion to restrict the resources available to its opponent to contest the very allegations at issue is no longer an adversarial system within the rubric of our American tradition.

CONCLUSION

The constitutional and practical problems created by fee forfeiture affect a great many cases and are of sufficient substance and importance to warrant review by this Court. Accordingly, this Court should grant the petition for certiorari.

Respectfully submitted,

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